Supreme Court, U. S.
FILED
APR 10 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-1280

E.F.I., INC.,
Petitioner

v.

M.I.I., A/K/A MARKETERS INTERNATIONAL, INC., ET AL, *Respondents*

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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Respondents, M.I.I., A/K/A Marketers International, Inc., and George Levit, file this response to prayer of Petitioner, E.F.I., Inc., that a Writ of Certiorari issue to review the orders of the Supreme Court of the State of Texas rendered on November 16, 1977, and December 14, 1977.

JURISDICTION

In Points of Error Number Three and Four filed in the Supreme Court of Texas (App. C, Petitioner's Brief) Petitioner complained of the refusal of the Texas Courts to allow a violator of the Texas Anti-Trust Laws (Peti-

tioner) to recover on a debt in Texas. In reviewing the "Questions Presented" to this Honorable Court, it appears doubtful that the questions raised by Petitioner in this Court have been previously raised in the Courts below. However, Respondents' reply to Petitioner's Petition will assume, for the moment, that this Court has jurisdiction to entertain the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner sued Respondent, M.I.I. on a debt, and Respondent, Levit, as a guarantor of such debt. The Texas Fourteenth Court of Civil Appeals held that the debt was based on a contract which was in violation of the Texas anti-trust laws, and was thus unenforceable on behalf of Petitioner in the Courts of Texas. The Supreme Court of Texas refused Petitioner's Application for Writ of Error.

Petitioner states that the Questions thereby arising are whether the action of the State of Texas constituted an impermissible burden which materially affected interstate commerce, and whether such action was in contravention of the Supremacy clause of the United States Constitution.

An examination of the opinions in the Courts below reflect that the Courts of the State of Texas simply refused to allow Petitioner, a violator of the Texas Anti-Trust Act, to recover on a debt arising from its illegal actions. Neither the constitutionality of the Texas anti-trust laws, nor the violation of such laws by Petitioner, has been questioned. The real question in this case is whether the Texas anti-trust laws can co-exist with the United States Constitution when the State of Texas refuses to allow a violator of its anti-trust laws from using

Texas Courts to recover on a debt based on the violation of Texas law.

STATEMENT OF FACTS

The Statement of Facts outlined by Petitioner in its Brief does not completely and accurately show the involvement and the interest of the State of Texas in the case at bar. Therefore, the additional Statement of Facts hereinafter set out should be considered as a supplement, and in some cases, a correction, to the Statement of Facts set out by Petitioner. References cited to the record are page numbers in the Official Statement of Facts of the trial of this cause.

During the time that Marketers distributed E.F.I. products as an exclusive distributor, there was advertising of these products in Texas (R 72). Money for the sale of E.F.I. goods inside and outside of Texas was received in Texas (R 73). Marketers prepared information for its salesmen selling E.F.I. goods in Texas (R 75). Marketers had 50 to 75 agents selling E.F.I. goods while it was an exclusive distributor, and only 30 to 50 of these were outside the State of Texas (R 76). Those persons who sold E.F.I. goods for Marketers outside the State of Texas attended 8 to 10 meetings in Texas during a one-year period concerning this business (R 77).

E.F.I. products were shipped to Marketers in Texas under all the agreements between the parties, and sales were made in Texas (R 286-287). Marketers was incorporated in Texas; payments were made to Marketers in Texas for E.F.I. goods; Marketers sold E.F.I. goods in Texas; the home office of Marketers was in Houston, Texas; and all of these matters were discussed with George Harris, President of E.F.I. (R 287).

Marketers shipped E.F.I. goods to its customers in Texas (R 287).

George Harris came to Texas on several occasions to discuss business matters regarding Marketers exclusive distributorship of E.F.I. products (R 288). The three contracts under which the parties did business, the May 13, 1968, letter, the December, 1969, contract, and the August, 1970, contract were all discussed between Marketers and E.F.I. in Texas before they were signed (R 288).

Most of the warehouses for E.F.I. products sold by Marketers under the distributorship agreements were in Texas (R 288). The financing for Marketers was arranged in Houston, Texas; sales meetings and instructions of salesmen were done in Houston, Texas, with regard to the E.F.I. products; more of the salesmen of E.F.I. products under the exclusive distributorship agreements with Marketers were to be in Texas and from Texas rather than any other state, and all of the foregoing was discussed with George Harris (R 289).

The Board of Directors meetings of Marketers, most of the officers, and most of the secretaries were in Texas, and most of the advertising and executive decisions were made in Texas (R 290).

Most of the customer complaints concerning E.F.I. products were made to Marketers in Houston (R 290). George Harris sent representatives of E.F.I. to Texas who found many bad transducers and switches in the E.F.I. products sold to Marketers in Texas (R 344).

Ten percent (10%) of Marketers sales of E.F.I. products were in Texas (R 524-525).

George Harris, President of E.F.I., testified that Marketers was the only exclusive dealer E.F.I. had in Texas (R 705). He further testified that all three contracts (including the May 13, 1968, letter) and the guarantee agreement, were the only agreements under which Marketers worked with E.F.I. (R 707). Mr. Harris admitted coming to Houston and working in the Marketers offices with Marketers salesmen, and helping to organize the office for the sale of E.F.I. products (R 708). Mr. Harris stated that Marketers took all the credit risks with regard to the sale of E.F.I. products sold to Marketers (R 709). Mr. Harris stated that E.F.I. considered all goods invoiced to Marketers a sale at that time to Marketers by E.F.I. during the existence of the distributorship agreements (R 735).

There were a total of 2,733 units shipped by E.F.I. while it was dealing with Marketers, and 792 were returned (R 753). Forty-three of the returns were from Texas customers (R 752).

It was contemplated by Mr. Harris in all of the business contracts and agreements with Marketers that Marketers would receive E.F.I. goods in Texas, sell the E.F.I. goods in Texas, that Marketers would be incorporated in the State of Texas, and receive payment for its sales in Texas (R 791-792).

M.I.I. paid E.F.I. or received credit from E.F.I. in the amount of $155,618.36, (over $90,000.00 of which were cash payments for goods) from January 1, 1970, until the parties ceased to do business (R 508).

The last contract between the parties was terminated on or about October 1, 1970 (R 1153-1154).

RESPONDENTS' REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT

I.

THE TEXAS SUPREME COURT HAS NOT PROMOTED OR IMPOSED AN UNREASONABLE, IMPERMISSIBLE AND UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE BY REFUSING TO ALLOW PETITIONER TO USE THE COURTS OF THE STATE OF TEXAS TO RECOVER ON A DEBT WHICH AROSE FROM A CONTRACT IN VIOLATION OF THE TEXAS ANTI-TRUST LAW.

Texas has not prevented Petitioner from selling its goods in Texas; from entering into valid, legal contracts in the State of Texas; from selling its goods anywhere in the United States; from suing on its debt in any other state of the union; from transporting its products into Texas; nor leveled any restrictions on the sale of Petitioner's product in the State of Texas. The Courts of the State of Texas have simply told Petitioner that it cannot recover on a debt in Texas Courts which is based on a contract in violation of the Texas Anti-Trust Act.

Petitioner has cited two cases which it states exhibit an impermissible interference and burden on interstate commerce. The first case is *City of Altus, Oklahoma v. Carr,* 255 F.Supp. 828 (W.D. Tex., 1966). In that case the State of Texas attempted to prevent a Texas resident from selling water from his land to an Oklahoma user. The Court held that such a restriction did constitute a direct burden upon and interference with interstate commerce. That case is far different from the case at bar.

There simply has been no attempt by the State of Texas to inhibit or restrict the flow of goods in any way in the case before this Court. There has been no attempt to restrict sales in interstate commerce.

Petitioner also cites *National Bellas Hess Inc. v. Dept. of Revenue of Illinois,* 386 U.S. 753, 87 S.Ct. 1389 (1967). In that case the U.S. Supreme Court refused to allow Illinois to impose a tax on National Bellas Hess when National's only contacts with Illinois were through the mail. It should be noted that the Court went to great lengths to show that National had no contact with the State of Illinois except by mail. At page 1392, the Court did point out that it had upheld the right of Florida to impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida where there was business activity of the Georgia seller in Florida:

> "There we held that Florida could constitutionally impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida. In that case the seller had '10 wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods'."

The contacts of E.F.I. with the State of Texas are significant as witnessed by the record of its activities in Texas. It chose to bring this suit in Texas. The *National case, supra,* is far different because the decision of the Court was based on the lack of contact of National with Illinois.

Petitioner is completely incorrect in its statement that Texas is attempting to cast restrictions based on its anti-trust statutes to the sale and shipment of goods from Florida to other states. Texas has simply refused to allow Petitioner to use the Texas Courts as a forum for the recovery of a debt based upon a contract which is illegal in Texas. Petitioner has sold and will no doubt continue to sell its goods in every state of the union outside of the contract which has long since been cancelled with respondents.

This Court, on a number of occasions, has had an opportunity to determine under what circumstances a burden on interstate commerce may be held unreasonable, impermissible and unconstitutional. In *Standard Oil Co. of Kentucky v. Tennessee,* 217 U.S. 413 (1910), 30 S.Ct. 543 (1909), the State of Tennessee forbade a Kentucky corporation from doing business, other than interstate commerce, in Tennessee. The reason for the denial of the Kentucky corporation's right to do business in Tennessee was a violation of that state's anti-trust law. This Court upheld the right of Tennessee to enforce its anti-trust statutes.

In *Sligh v. Kirkwood,* 237 U.S. 52 (1915), 35 S.Ct. 501 (1914), the State of Florida litigated against the shipment of immature or otherwise unfit citrus fruits. This Court recognized the authority of the state to use its police powers to regulate even though such regulations might involve interstate commerce.

In *Griffin v. McCoach,* 313 U.S. 498, 61 S.Ct. 1023 (1941), the lower courts had held that beneficiaries under a life insurance policy could recover the proceeds even though the beneficiaries had no insurable interest in

the life of the deceased under Texas law. This Court reversed the decision of the Circuit Court of Appeals and remanded the case. At this point the Court squarely faced whether the application of Texas laws "would constitute an unwarranted extra-territorial control of contracts and regulation of business." The Court held that the Texas Courts could constitutionally refuse recovery to the beneficiaries if they did not have an insurable interest under Texas law. The Court pointed out that a state would not be required to lend the aid of its Courts to enforce a a contract against the public policy of the state, and could constitutionally refuse to lend its aid to enforce foreign contracts which required the doing of prohibited acts within the state of the forum.

In *Duckworth v. Arkansas,* 314 U.S. 390, 62 S.Ct. 311 (1941), this Court upheld Arkansas statutes prohibiting transportation of liquor, holding that there was no undue burden on interstate commerce and that there was no interference with the free flow of commerce beyond that which a state is allowed to do in preventing unlawful distribution of liquor in that state.

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179, 71 S.Ct. 215 (1950), this Court affirmed the right of the state to enforce state regulations which have some impact on interstate commerce as long as the regulations are not discriminatory and do not place an embargo on interstate commerce. There was no discrimination or embargo on E.F.I. products.

In *Head v. New Mexico Board of Examiners in Optometry,* 374 U.S. 424, 83, S.Ct. 1759 (1963), this Court stated that state statutes which are otherwise valid must be upheld unless there is an actual conflict between

state and federal schemes of regulation to the extent that both cannot stand in the same area, or unless there is evidence of a congressional design to pre-empt the field.

The Congress of the United States has never attempted to preclude states from enacting anti-trust laws. The State of Texas in the case at bar has not attempted to prohibit interstate commerce nor to impose restrictions upon it. The State of Texas has simply used its constitutional authority recognized by the Supreme Court of the United States to prevent the use of its Courts for a recovery based upon a violation of its anti-trust laws.

II.

THE STATE OF TEXAS HAS A PROPER INTEREST IN THE ENFORCEMENT OF THE LAWS OF ITS STATE TO JUSTIFY THE DENIAL OF THE USE OF ITS COURTS BY PETITIONER TO RECOVER ON A DEBT FOUNDED ON A CONTRACT IN VIOLATION OF TEXAS ANTI-TRUST LAW.

The Statement of Facts sets out the enormous contact that the State of Texas had with the business out of which Petitioner's suit arose. Petitioner cites *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), for the proposition that there must be significant local interest for the state in order to allow an imposition on interstate commerce by state law. In the *Pike case,* this Court pointed out that the desire of Arizona to have its name on its produce amounted not to a complaint by Arizona that the company was putting the good name of Arizona on an inferior or deceptively packaged product, but because the company was not putting the name of Arizona on a product that was superior and well-packaged. The State of Arizona wanted its name to appear on the products though they were to be shipped only about 31 miles for the purposes of processing and packaging in another state. This Court rightly held that the burden of requiring the company to construct a $200,000.00 facility to package the products was too large a burden compared to the interest of Arizona in having its name on a product during the time it was shipped 31 miles for processing and packaging. In the case at bar, however, Petitioner faces no such burden. It can still ship its goods anywhere in the United States and sell them without additional expense. The Courts of Texas have simply refused to allow the Petitioner to collect on a debt in Texas because of the violations of Texas anti-trust laws.

The other case cited by Petitioner is *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 80 S.Ct. 813 (1960). That case is especially significant because it points out that federal and state regulation may coexist, and the local regulations should be given full force and effect even though there might be some effect on interstate commerce. In that case the pollution regulations of the City of Detroit were upheld even though they were applied to vessels which had been approved in accordance with federal law. This Court pointed out that its decisions had always sought to enjoin the seeking out of conflicts between state and federal regulations where none clearly exist. This Court further stated that state regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.

This case clearly points out that Texas anti-trust laws can exist with the right of the federal government to regulate interstate commerce. Petitioner's right to act in interstate commerce is not restricted by the fact that the Texas Courts will not entertain its suit on a debt based on violations of Texas anti-trust law. Many of Petitioner's products were sold in Texas by M.I.I. from its Texas warehouses. The interest of the State of Texas is clear in enforcing its anti-trust laws under such a situation. The right of Petitioner to sell its products elsewhere, and even to enforce suits for collection of debts based on the sales is not impaired by the application of Texas anti-trust laws in a Texas Court.

In *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124 (1927), this Court was faced with a contract which was obnoxious to Minnesota law and was attempted to be enforced in Minnesota. The Maryland company seeking to enforce the contract was held to have been properly refused access to the Minnesota Courts to enforce its contract. This is entirely consistent with *Griffin v. McCoach, supra,* to the effect that a state does have a vital interest in enforcing its own law, even if there is some effect on interstate commerce. Likewise, in *Sligh v. Kirkwood, supra,* the authority of the state tc regulate products within its state being shipped in interstate commerce was upheld. The State of Texas in the case at bar is not taking any affirmative action to prevent or inhibit interstate commerce. It is simply acknowledging the existence of its own anti-trust laws in order to deny the use of its Courts for a collection of a debt in violation of these statutes. If the State of Texas were not allowed to enforce its anti-trust laws merely because a product involved in the anti-trust laws was used in interstate

commerce, it would effectively prohibit the State of Texas from ever enforcing any of its anti-trust laws, or even recognizing their existence because almost every product imaginable has some relation to interstate commerce.

This Court denied Petition for Writ of Certiorari in a Texas case where both federal and state anti-trust statutes were involved. In *State v. Southeast Texas Chapter of National Electrical Contractor's Assoc.*, 358 S.W. 2d 711 (1962), cert. den., 372 U.S. 969, 83 S.Ct. 1098, 10 L.Ed.2d 131 (1963), the State of Texas filed a civil anti-trust suit for violations of its anti-trust laws within the State of Texas. The same Defendants were also faced with a federal criminal indictment. The Court of Civil Appeals in Texas held that the state suits could be properly continued even though the federal indictments were pending. It is worthy of note that the United States by amicus curiae brief pointed out that the Sherman Act did not pre-empt the field of regulation of interstate trade and commerce thereby precluding Texas from exercising jurisdiction over anti-trust matters in the exercise of the police power of the State of Texas. This was held true even though 75-90 percent of the electrical equipment involved in that case was manufactured in states other than Texas and shipped in interstate commerce to Texas. In that case it was crystal clear that the State of Texas had a right to enforce its own anti-trust laws even though they dealt with products in interstate commerce and the federal government had also enacted statutes in the same area which were being implemented in companion cases of the same type. It is absolutely untenable, based upon this opinion and the others cited in this brief, that the State of Texas should not be allowed to deny the use of its Courts to a violator of its laws.

Any State has a vital compelling interest in the enforcement of its laws. In *Duckworth v. Arkansas, supra, Cities Service Gas Co. v. Peerless Oil & Gas Co., supra,* and *Head v. New Mexico Board of Examiners in Optometry, supra,* the interest of a state in enforcing its own laws was recognized even though the application of those laws was made in situations which involved interstate commerce.

CONCLUSION

The key to analysis of Petitioner's Petition for Writ of Error is the realization that the State of Texas has previously been held by this Court to have the right to deny the use of its courts to a violator of its laws, and to withhold relief to a party if granting such relief would violate its laws and public policy. Equally important is the fact that the ability of Petitioner to act in interstate commerce is not restricted by the fact that the Texas Courts will not entertain a suit upon its debt founded upon contracts which violate Texas anti-trust law. For all these reasons the Petition for Writ of Certiorari to the Supreme Court of the State of Texas should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 true and correct copies of the above and foregoing Respondents' Reply to Petition For Writ of Certiorari to the Supreme Court of the State of Texas, has been hand delivered to Attorney GEORGE PAIN, 2 Houston Center, Suite 1016, Houston, Texas 77002, on this 24 day of April, 1978.

George Payne

GEORGE PAYNE